



**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**Buy America Waiver Notification**

**AGENCY:** Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

**ACTION:** Notice.

**SUMMARY:** This notice provides information regarding FHWA's finding that a Buy America waiver is appropriate for procurement of a mobile harbor crane constructed with foreign iron and steel components for the International Marine Terminal (IMT) at the Port of Portland in the State of Maine.

**DATES:** The applicable date of the waiver is [insert date one day after publication in Federal Register].

**FOR FURTHER INFORMATION CONTACT:** For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202) 366-1562, or via e-mail at [Gerald.Yakowenko@dot.gov](mailto:Gerald.Yakowenko@dot.gov). For legal questions, please contact Mr. Patrick Smith, FHWA Office of the Chief Counsel, (202) 366-1345, or via e-mail at [Patrick.C.Smith@dot.gov](mailto:Patrick.C.Smith@dot.gov). Office hours for FHWA are from 8:00 a.m. to 4:30 p.m., E.S.T., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

An electronic copy of this document may be downloaded from the Federal Register's home page at: <http://www.archives.gov> and the

Government Publishing Office's database at: <http://www.access.gpo.gov/nara>.

## **Background**

The FHWA's Buy America regulation in 23 CFR § 635.410 requires a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not produced in the United States in sufficient and reasonably available quantities. This notice provides information regarding FHWA's finding that a Buy America waiver is appropriate for use of non-domestic iron and steel components associated with a mobile harbor crane for the IMT at the Port of Portland in the State of Maine. The mobile harbor crane is not available to be produced using 100 percent domestic steel or iron.

**Maine Intermodal Port Productivity Project:** On July 1, 2016, DOT selected the Maine Department of Transportation (MaineDOT) to receive a grant of funds for the Maine Intermodal Port Productivity Project (Project) at the Port of Portland under the FASTLANE discretionary grant program. On February 6, 2017, FHWA executed a term sheet with MaineDOT, formalizing the scope, schedule, and budget of the award. Improvements under the Project included: (i) removing the existing maintenance facility and infill of the wharf; (ii) installing a new mobile harbor crane and other cargo handling equipment; (iii) constructing a highway and rail crossing upgrade; and (iv) building a

new terminal operations and maintenance center. The projected cost of the new mobile harbor crane was \$4.5 million, with \$2.25 million from the FASTLANE Program, \$1.3 million from the Congestion Mitigation and Air Quality Improvement Program, and \$950,000 from a State bond. The U.S. Maritime Administration (MARAD) was designated as the DOT Operating Administration responsible for overseeing the Project, but FHWA also retained certain responsibilities related to the project agreement(s), overseeing the reimbursement process, and final close-out.

MaineDOT and MARAD determined that the improvements under the Project each had independent utility or independent significance. Thus, each improvement proceeded under a different development timeline and separate Categorical Exclusion (CE) under the National Environmental Policy Act, including a separate CE for the mobile harbor crane.

In early 2017, MaineDOT determined that mobile harbor cranes meeting its needs for the Project were not produced in the United States. Based on this determination, it submitted a Buy America waiver request to FHWA for the mobile harbor crane on March 8, 2017. Outside the scope of the FASTLANE grant, MaineDOT purchased a new mobile harbor crane for the IMT at the Port of Portland in 2018 using State funds only. However, MaineDOT continues to need the mobile harbor crane under the FASTLANE grant to replace the older of the two cranes it now has at the IMT at the Port of Portland.

As of the date of this notice, the Project improvements are complete except for purchasing the mobile harbor crane. Without a Buy America waiver, MaineDOT cannot

proceed with purchasing a crane using FASTLANE grant funds because the only known manufacturer for this type of crane is in Germany.

**Mobile Harbor Crane Needed by Maine DOT:** MaineDOT continues to need one mobile harbor crane, which is suited for port operations in a marine environment for use in container or spreader loading and unloading operations. The crane must be mobile and equipped with rubber tires, feature level luffing, and include an enclosed cabin and staircase. The crane must be capable of simultaneous and independent operations of slewing, main hoist, and boom hoist motions under full load and speed. The crane must have the capability to lift containers of 41 metric tons (90,000 lbs.) while at a 101 foot (31 meter) working radius when operating within the limited outrigger footprint. The crane Load Moment Indicator must also have a pre-programmed mode to take this limited footprint into consideration. Specially designed outrigger pads will also need to be included to accommodate the structural limitations of the pier. The crane will need to have the specially designed outrigger pads to ensure that the corner load is evenly distributed over three structural pile caps and directly above the piles themselves. Additional information on the mobile harbor crane needed by MaineDot is available under RFP # 201910181 issued on January 10, 2020, at <https://www.maine.gov/dafs/bbm/procurementservices/vendors/rfps>.

**Waiver Request and Supporting Information:** The MaineDOT originally submitted a Buy America waiver request to FHWA for the mobile harbor crane on March 8, 2017. Prior to submitting its waiver request, MaineDOT sought but was unable to

identify domestic manufacturers for the crane. The FHWA initially published a notice of intent to issue a waiver on its Web site on March 13, 2017.

On April 18, 2017, President Trump issued Executive Order (EO) 13788 requiring every executive branch agency to monitor, enforce, and comply with existing “Buy American Laws” and minimize the use of waivers. In addition, EO 13788 also set forth a policy “to maximize, consistent with law, ... the use of goods, products, and materials produced in the United States.” Consistent with EO 13788, before issuing a waiver, FHWA requested that MaineDOT seek to maximize the use of domestic content on the mobile harbor crane.

Following this request, MaineDOT spent several months working with FHWA and MARAD to develop a request for proposal (RFP) for the mobile harbor crane seeking to identify domestic manufacturers or, if full compliance was not possible, foreign manufacturers that could maximize use of domestic content by using greater quantities of U.S. steel. The RFP was issued by MaineDOT on January 10, 2020, and is available under RFP # 201910181, at <https://www.maine.gov/dafs/bbm/procurementservices/vendors/rfps>. In that RFP, MaineDOT included two notable provisions to increase its use of domestic content. First, the RFP required bidders to describe domestic content in their bid and weighted that information in its best value evaluation. Second, the RFP stated that a bid would not be considered responsive, and therefore could not be selected, unless the bidder certified compliance with Buy America or maximized the use of domestic content to justify a Buy

America waiver. Recognizing the need for Buy America compliance, MaineDOT has not awarded a bid while its waiver request is outstanding.

Following issuance of RFP # 201910181, MaineDOT received a single bid on February 10, 2020, from Liebherr USA, Co., a German manufacturer, for \$5.085 million including zero American steel content. The bid requested a Buy America waiver.

Liebherr explained that it produces its Liebherr Mobile Harbor Cranes in its existing factory in Rostock, Germany. Liebherr also explained that establishing a unique design and order process to incorporate U.S. steel content into the crane was technically possible, but would increase delivery time by 18 months and the cost of the crane by at least 35 percent to around \$7 million (or more). Although it does not produce mobile harbor cranes in the U.S., Liebherr explained that it does have other manufacturing facilities in the U.S. For example, it explained that it invested \$45 million into expanding a factory and warehouse in Newport News, Virginia. Liebherr maintains that, between facilities in Virginia and Miami, Florida, it has invested over \$65 million into U.S. facilities and has over 1,100 U.S. employees. Considering that MaineDOT originally estimated that a new mobile harbor crane would cost \$4.5 million, asking Liebherr to develop a unique design and order process to incorporate U.S. steel content appears financially infeasible.

As described above, although MaineDOT did not identify compliant products, it provided information to FHWA supporting its waiver request, including:

- information describing the domestic content characteristics of the manufactured

product needed, including the sources and assembly locations of that product;

- information supporting the technical necessity of this specific product for operations of the IMT at the Port of Portland; and
- information documenting efforts to maximize domestic content even if full compliance was not possible, including collaboration with FHWA to develop an RFP designed to maximize domestic content.

**Public Comments on Waiver Request:** In accordance with the Consolidated Appropriations Act of 2016 (Pub. L. 114-113) and the Continuing Appropriations Act of 2017 (Pub. L. 114-223), FHWA published a notice of intent to issue a waiver on its Web site, <https://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=145>, on March 13, 2017. The FHWA received no comments in response to the publication.

**Finding and Request for Comments:** Based on all the information available to and received by it, FHWA concludes that there are no domestic manufacturers of the mobile harbor crane. This finding is only for a single mobile harbor crane for the IMT at the Port of Portland in the State of Maine.

The MaineDOT and its contractors and subcontractors involved in the procurement of the mobile harbor crane are reminded of the need to comply with the Cargo Preference Act in 46 CFR part 38, if applicable.

In accordance with the provisions of section 117 of the SAFETEA-LU Technical Corrections Act of 2008 (Pub. L. 110-244, 122 Stat. 1572), FHWA is providing this notice as its finding that a waiver of Buy America requirements is appropriate. The

FHWA invites public comment on this finding for an additional 5 days following the effective date of the finding. Comments may be submitted to FHWA's Web site via the link provided to the waiver page noted above.

(Authority: 23 U.S.C. 313; Pub. L. 110-161, 23 CFR 635.410)

**Nicole R. Nason,**

*Administrator,*

*Federal Highway Administration.*

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